Health Care Services Group, Inc. *and* United Food and Commercial Workers Union, Local 1444, affiliated with United Food and Commerical Workers International Union, AFL–CIO–CLC. Case 30–CA–14061

June 13, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On June 10, 1998, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

The General Counsel has excepted to the judge's failure to include in his Order a provision requiring the Respondent to reinstate the tentative bargaining agreements reached with the Union effective August 11, 1997. We find merit in the General Counsel's exceptions and, consistent with Board precedent, shall modify the Order to require the Respondent to reinstate the tentative agreements to restore "the status quo between the parties before the unfair labor practices began." *NLRB v. Beverly Health & Rehabilitation Services,* 187 F.3d 769, 772 (8th Cir. 1999), enfg. *New Madrid Nursing Center,* 325 NLRB 897, 903 (1998).[1]

We shall also modify paragraphs 1(e) and 2(a) of the Order to conform to the violations found and issue a new notice to employees.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Health Care Services Group, Inc., Hinsdale, Illinois, its officers, agents, successors, and assigns, shall, with regard to its laundry and housekeeping employees employed at Audubon Health Care Center, Bayside, Wisconsin, take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(e).

"(e) Engaging in regressive bargaining without good cause or justification."

2. Substitute the following for paragraph 2(a).

"(a) On request, bargain in good faith with the Union, as the exclusive bargaining representative of its employees in the above-described bargaining unit with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed written agreement."

3. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Reinstate, for the purposes of good-faith bargaining, the tentative agreements reached with the Union effective August 11, 1997."

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to bargain in good faith with the United Food and Commercial Workers Union, Local 1444, affiliated with United Food and Commercial Workers International Union, AFL–CIO–CLC, as the exclusive bargaining representative in the following unit:

> All full and regular part-time laundry and housekeeping employees, who perform laundry and housekeeping services at Audubon Health Care Center, Bayside, Wisconsin.

WE WILL NOT fail to appear at and/or cancel scheduled bargaining sessions, unless there is a compelling reason to do so and the Union has been notified in advance.

WE WILL NOT fail to provide the Union in a timely manner, on request, with proposals on unresolved issues.

WE WILL NOT renege on tentative agreements reached with the Union during collective bargaining.

WE WILL NOT engage in regressive bargaining without good cause or justification.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL on request, bargain in good faith with the Union, as the exclusive bargaining representative of employees in the above-described bargaining unit with respect to wages, hours, and other terms and conditions

[1] As we noted in *The Independent*, 320 NLRB 1029 fn. 3 (1996), "[n]othing in our Order prevents the parties, during their ongoing collective-bargaining negotiations, from mutually agreeing to reopen and reconsider in light of changed circumstances, subjects on which they have tentatively agreed."

of employment and, if an understanding is reached, embody such understanding in a signed written agreement.

WE WILL regard the Union as the exclusive bargaining agent of employees in the bargaining unit for 1 year commencing with the resumption of negotiations between the Union and our company.

WE WILL meet with the Union on specified scheduled dates as agreed on by the parties.

WE WILL formulate and give to the Union, in a timely manner, proposals on unresolved issues and not regress from these proposals without good cause or justification.

WE WILL reinstate, for the purposes of good-faith bargaining, the tentative bargaining agreements we reached with the Union effective August 11, 1997.

HEALTH CARE SERVICES GROUP, INC.

Joyce Ann Seiser, Esq., for the General Counsel.
Timothy E. Smith, District Manager, Pro Se, of Bayside, Wisconsin, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Milwaukee, Wisconsin, on April 27, 1998. The charge was filed November 13, 1997,[1] and the complaint was issued February 27, 1998.

On the entire record, including my observation of the demeanor of the witnesses,[2] I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is headquartered in the State of Pennsylvania. It maintains a regional office in Hinsdale, Illinois, and provides laundry and housekeeping services at the Audubon Health Care Center, a nursing home, in Bayside, Wisconsin. It annually provides services valued in excess of $50,000 for customers located outside of the State of Wisconsin. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, United Food and Commercial Workers Local Union 1444, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The General Counsel alleges that Respondent has failed to bargain in good faith with the Union. Local 1444 was certified as the exclusive bargaining representative of the employees in the following unit on March 3, 1997:

> All full-time and regular part-time laundry and housekeeping employees of the employer who perform contract laundry and housekeeping services at Audubon Health Care Center, excluding all other employees, guards, and supervisors, as defined in the Act.

On April 9, Bruce Thompson, a union business representative, held his first meeting with Respondent to discuss negotiations for a collective-bargaining agreement.[3] Attending this meeting in Thompson's office for Respondent were James Schreck, its regional manager for the territory covering Wisconsin, district manager, Timothy Smith, and James Rehn, a management trainee. At this meeting Schreck and Smith told Thompson that Smith had authority to negotiate for Respondent, but would keep Schreck advised of any tentative agreements. Thereafter, Smith was Respondent's only representative at the negotiating sessions.

The April 9 meeting lasted about 2 hours. It consisted primarily of an exchange of information. The parties agreed to meet again on May 16. This time period was extended at Respondent's request to give it sufficient time to assemble a proposal.

All subsequent meetings prior to March 1998, were also at Thompson's office. At the parties' second meeting on May 22 the Union presented Respondent with a proposed collective-bargaining agreement and explained its proposal to Smith. Respondent did not present any proposals to the Union. Bruce Thompson informed Smith that he had authority to negotiate for the Union, although any agreement would have to be approved by a majority of bargaining unit employees. Smith reiterated that he had authority to negotiate for Respondent.

The union proposal was not complete. Some subjects, such as health and welfare, and attendance were not addressed because the Union was waiting for Respondent to provide it with information as to the Company's existing practices.

Thompson and Smith met a third time on June 13. Tim Smith sat across Thompson's desk as Thompson reviewed the union's proposals with him. When Smith indicated agreement with the proposals, Thompson made a notation in the left hand margin "Agreed BT/TS 6/13." On June 13 Smith indicated his consent to the union proposals regarding recognition of the Union, nondiscrimination and union security. Initially the parties disagreed on the probationary period for new hires, during which Respondent could terminate an employee at will. They did however agree to a 60-day period, with an opportunity in certain situations for a 30-day extension of this period. Agreement was also reached on the demarcation of full-time and regular part-time employees.

Tentative agreement was also reached on June 13 with respect to union proposals regarding seniority, hours of work, overtime, rest periods, vacancies, uniforms, physical examinations, jury duty, and funeral pay. The parties also tentatively agreed on Local 1444's proposals on leaves of absence, union stewards, and a grievance procedure. Additionally, Smith indicated consent to a no-strike/no-lockout provision, one regarding a union bulletin board and visitation rights for union officials. Thompson promised Smith that he would not visit Audubon Health Care until the Union had a collective-bargaining agreement with the nursing home.[4] The parties also tentatively agreed on a savings clause and a successorship provision and agreed to meet again on July 17.

[1] All dates are in 1997 unless otherwise indicated.

[2] Both parties waived briefs. The General Counsel filed a memorandum of law at the close of the hearing.

[3] I have credited Bruce Thompson's testimony regarding the negotiations. Respondent presented no witnesses to contradict him.

[4] Local 1444 is also the certified bargaining representative of a unit of Audubon employees. On April 25, 1997, the Board found Audubon to be in violation of Sec. 8(a)(1) and (5) for its refusal to bargain with the Union, *Audubon Health Care Center,* 323 NLRB No. 85 (1997) (not published in bound volume). As of April 27, 1998, the Union had not negotiated a collective-bargaining agreement with Audubon.

Without notifying Thompson, Smith failed to show up for their July 17 meeting. A few days later he called to say that he failed to attend due to a work emergency. The parties met again on July 19. The Union agreed to allow Respondent to bring employees into Audubon from outside the bargaining unit if it could not get enough bargaining unit employees to work overtime. It also deleted a proposal allowing employees leave without pay to attend union conventions.

The parties' fifth meeting was held in Thompson's office on August 11. They reached tentative agreement on an article granting bargaining unit employees 3 personal leave days after 1 year of service. They agreed on articles regarding paid holidays, sick leave, and vacations. The Union withdrew its request for a pension plan.

On this date the Union made its first proposal regarding wages. Smith indicated Respondent's agreement to Thompson's proposed $6.25 starting rate for new employees. Respondent was already paying its new hires at Audubon $6.25 per hour. Smith and Thompson also agreed to a schedule gradually raising new employees' salaries to $7 per hour after 2 years of service with Respondent. Smith also indicated tentative agreement to a 30-cent-per-hour wage increase for current employees effective March 1, 1998, and March 1, 1999.

The Union withdrew other proposals. At the end of the August 11 session the parties had the remaining unresolved issues: the union's request for a wage increase for current employees retroactive to March 3; shift differentials; and the management-rights clause.

Tim Smith did not show up for the parties' next scheduled meeting on August 21, nor did he notify Thompson until a few days later. He failed to come to Thompson's office again for a meeting scheduled for September 4. A few days later, the two negotiators talked on the telephone. Smith said he had no proposals to offer yet and had not had a chance to discuss the negotiations with his boss, Jim Schreck.

On October 9, Smith came 90 minutes late to a scheduled meeting with Thompson. He did not bring with him any proposals and again said he had not had a chance to discuss Respondent's positions with Schreck.

Smith canceled a meeting scheduled for October 21, but faxed Respondent's "Initial response to union contract" to Thompson on October 30. The document contained little of the parties' previous tentative agreements. For example, although Respondent had tentatively agreed to maintain its existing $6.25 starting wage rate for new hires, the October 30 proposal contained a $6 rate. Respondent also proposed a 0–4 percent wage increase, based on performance, for new hires after a 6-month review and the same increase for current employees.

On November 5 Smith met with Thompson again. Thompson presented Smith with the union's first proposal on management rights. He asked Smith for proposals on this issue, as well as retroactive wage increases for current employees, shift differentials and management rights. The union's initial unfair labor practice charge was filed a week after this meeting.

On December 12 the parties met once more. Respondent's only proposal was a 1–4 percent wage increase based on its assessment on each employee's performance.

Smith presented the Union with a one page final offer on January 6, 1998. It included a 0–4 percent increase in the wages of current employees, effective 10 days after the signing of the collective-bargaining agreement. It rejected a retroactive increase and any shift differentials. For new employees, Respondent proposed a $6-per-hour rate, with a 50 cent raise upon completion of a probationary period and another 25-cent raise after 1 year. Thereafter, they would be eligible for a 0–4 percent increase based on performance. The Union rejected this offer and the Company withdrew it. Respondent also proposed disciplinary rules on January 6, which it withdrew 2 weeks later.

On February 26, 1998, the parties met at the Board office in Milwaukee. The company proposed an annual 10-cent-per-hour increase for current employees in 1998, 1999, and 2000. Smith also proposed a wage schedule for new employees starting at $5.75 per hour and progressing to $5.85 after 1 year, $6 per hour after 2 years, and $6.15 after 3 years. After a break in the negotiations, Smith proposed a different pay schedule for current employees making $6.25 per hour. They would get $6.40 effective January 1, 1998, $6.55 on January 1, 1999, and $6.70 on January 1, 2000. Smith offered no proposals for those employees making more than $6.25 per hour. Further meetings on March 26, April 13, 17, and 25 (2 days prior to the instant hearing), produced no further agreements. On April 17 the Union demanded adherence to the tentative agreements reached by August 11, 1997. Respondent rejected this demand.

Analysis and Conclusions

In *Atlanta Hilton & Tower,* 271 NLRB 1600, 1603 (1984), the Board summarized the obligations of employers and unions under Section 8(a)(5):

> Under Section 8(d) of the Act, an employer and its employees' representative are mutually required to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." Both the employer and the union have a duty to negotiate with a "sincere purpose to find a basis of agreement," but "the Board cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position." The employer is, nonetheless, "obliged to make some reasonable effort in *some* direction to compose his differences with the union, if Section 8(a)(5) is to be read as imposing any substantial obligation at all."
>
> It is necessary to scrutinize an employer's overall conduct to determine whether it has bargained in good faith. "From the context of an employer's total conduct, it must be decided whether the employer is lawfully engaging in hard bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." A party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree. . . .
>
> Although an adamant insistence on a bargaining position is not of itself a refusal to bargain in good faith . . . other conduct has been held to be indicative of a lack of good faith. Such conduct includes delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bar-

gaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings.[5]

Several of the indicia mentioned above are present in the instant case and lead me to conclude that Respondent did not bargain in good faith. Most notable are Respondent's withdrawal from all of the tentative agreements it had reached with the Union prior to August 11, and what appears to be the lack of authority given to Timothy Smith to commit Respondent to any proposals. It is not indicative of a lack of good faith for Smith to keep his supervisor, James Schreck, informed of all tentative agreements. It would not necessarily be an indication of bad faith for Respondent to ask the Union to revisit a limited number of issues after Schreck's review. What does indicate a lack of good faith is Smith's lack of authority to commit Respondent to any proposals and the long delay in raising objections and making counteroffers to union proposals on which there had been tentative agreement.

Similarly, Respondent's failure to make any proposals until October 30, 6-1/2 months after bargaining began, is indicative of a lack of good faith, *Bryant & Stratton Business Institute,* 321 NLRB 1007, 1041–1043 (1996). Moreover, Respondent never made any comprehensive proposal to the Union.

Possibly the clearest indication of bad faith and the lack of any intention of reaching agreement with the Union is Respondent's regressive bargaining, *Homestead Nursing Center,* 310 NLRB 678 (1993). For example, on August 11 Respondent agreed to a starting wage rate for new employees of $6.25 per hour, the rate it was paying such employees at the time. Two and half months later, Respondent repudiated this agreement and proposed a lower starting wage rate of $6 per hour. On February 26, 1998, Respondent made an even more regressive proposal. Health Care Services offered no explanation for this regression. It strongly suggests an intent to prevent the negotiation of a collective-bargaining agreement.

Other factors also indicate a desire to frustrate any agreement. Smith's failure to show up at several negotiating sessions, without providing the Union notice that he would do so, indicates a lack of serious intent on the part of Respondent, *see Calex Corp. v. NLRB,* 144 F.3d 904 (6th Cir. 1998). Similarly, Respondent's proposals which left it with unfettered discretion with regard to wage increases, in the context in which they occurred, suggests that such proposals were made largely to frustrate agreement of any kind.

CONCLUSION OF LAW

By refusing to bargain collectively in good faith with the Union, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent will be ordered to resume negotiations with the Union on request and bargain collectively in good faith concerning wages, hours, and the other terms and conditions of employment, and if an understanding is reached, to embody it in a written agreement.

Where an employer, after a union's certification, has failed or refused to bargain in good faith with that union, the Board ensures that the union has at least 1 year of good-faith bargaining during which its majority status cannot be questioned, *Mar-Jac Poultry Co.,* 136 NLRB 785 (1962). Given the lack of any indication that Respondent has ever bargained with the Union in good faith, I conclude that this year shall begin to run on the resumption of bargaining between the parties.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Health Care Services Group, Inc., Hinsdale, Illinois, its officers, agents, successors, and assigns, shall, with regard to its employees at Audubon Health Care Center, Bayside, Wisconsin,

1. Cease and desist from

(a) Refusing to bargain collectively in good faith with the Union as the exclusive bargaining representative of the employees in the following appropriate unit:

> All full and regular part-time laundry and housekeeping employees, who perform contract laundry and housekeeping services at Audubon Health Care Center, excluding all other employees, guards, and supervisors as defined in the Act.

(b) Failing to appear at and/or canceling scheduled bargaining sessions, unless there is a compelling reason to do so and the Union has been notified in advance of the bargaining session.

(c) Failing to provide the Union, on request, with proposals on unresolved issues.

(d) Reneging on tentative agreements reached with the Union during collective bargaining.

(e) Engaging in regressive bargaining.

(f) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union, as the exclusive bargaining representative of its employees in the above-described bargaining unit with respect to wages, hours, and other terms and conditions of employment.

(b) Regard the Union as the exclusive agent of its employees for 1 year commencing with the resumption of bargaining between the parties.

(c) Meet with the Union on specific scheduled dates as agreed upon by the parties.

(d) Formulate and give to the Union in a timely manner, proposals on unresolved issues and not regress from them without good cause or justification.

(e) Within 14 days after service by the Region, post at the Audubon Health Care Center, Bayside, Wisconsin, copies of the attached notice marked "Appendix."[7] Copies of the notice,

[5] Case citations from the Board's decision have been omitted.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Na-

on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 9, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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tional Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."